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IN THE

Supreme Court of the United States.

October Term, 1977.

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No. 152.

BETH ISRAEL HOSPITAL,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Beth Israel Hospital.

LOUIS CHANDLER,
Attorney for Petitioner,
99 High Street,
Boston, Massachusetts 02110.
(617) 542-6789

Of Counsel:
Robert Chandler,
Stoneman, Chandler & Miller.

ADDISON C. GETCHELL & SON, INC., THE LAWYERS' PRINTER, BOSTON

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Brief for Beth Israel Hospital.

Opinions Below.

The opinion of the Court of Appeals for the First Circuit is reported at 554 F. 2d 477, 95 LRRM 2230 (1977). (The opinion of the First Circuit is reproduced in Appendix C of the petition for a writ of certiorari filed in this case.) The opinion of the National Labor Relations Board is reported at 223 NLRB No. 188, 92 LRRM 1078 (1976). (The opinion of the Board is contained in Appendix B of said petition.)

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on April 29, 1977. On July 27, 1977, Beth Israel Hospital filed its petition for a writ of certiorari which was granted on January 16, 1978. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

Statutes Involved.

The relevant statutes are the pertinent parts of sections two, seven and eight of the *National Labor Relations Act*, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151, *et seq.* The language of those sections as of the dates involved in this case provided:

United States Code, Title 29:

§ 152 — Definitions.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

. . .

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

§ 157 — Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158 — Unfair Labor Practices.

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

Questions Presented.

I. Whether the National Labor Relations Board can continue to adhere to a policy regarding solicitation and distribution in a hospital setting which unduly ignores the rights of the hospital and the well-being of hospital patients.

II. Whether the NLRB erred by invalidating a hospital's no-solicitation, no-distribution rule as applied to its cafe-

teria and coffeeshop — areas where patients, visitors and employees intermingle.

Statement of the Case.

Beth Israel Hospital (hereinafter referred to as the "Petitioner" or the "Hospital") is a nonproprietary hospital located at 330 Brookline Avenue, Boston, Massachusetts. It is an employer within the meaning of the *National Labor Relations Act* (hereinafter referred to as the "Act"). The Petitioner employs approximately 2,200 employees excluding house staff, attending physicians, students and Harvard employees who work on the premises.

On October 29, 1974, an unfair labor practice charge was filed against Petitioner by Massachusetts Hospital Workers Union, Local 880, Service Employees International Union, AFL-CIO (hereinafter referred to as the "Union"), a labor organization within the meaning of the Act.

The complaint, dated February 21, 1975, charged the Hospital with violating section 8(a)(1) of the Act (29 U.S.C. §§ 158(a)(1) *et seq.*) by initiating, promulgating and maintaining a written rule prohibiting distribution of union literature and solicitation except on a "one-to-one" basis in the facility's cafeteria and coffee shop; and sections 8(a)(1) and 8(a)(3) by issuing oral and written warnings to employee Ann Schunior and threatening her with dismissal if she continued to distribute literature in the cafeteria of the Hospital. The Petitioner denied that it had engaged in conduct violative of the Act. Subsequently, the Hospital, in order to obtain from the Board a complete delineation of the parameters for no-solicitation and no-distribution rules in public areas of a non-proprietary hospital, modified its rules to also prohibit "one-to-one" solicitation. On April 9, 1975, the complaint was amended

by the Board to charge the Hospital with a further violation by virtue of its modified rule.[1]

Following a hearing, the Administrative Law Judge ruled that the Hospital's no-solicitation and no-distribution rules violated the Act. The Hospital filed exceptions to his decision. The Board affirmed the decision and order of the Administrative Law Judge. 223 NLRB No. 188, 92 LRRM 1078 (1976).[2]

Upon the Board's petition for enforcement, the United States Court of Appeals for the First Circuit under the

[1] The no-distribution, no-solicitation rules in effect at the time of the hearing before the Administrative Law Judge read as follows:

> There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting and the distribution of literature to Beth Israel employees may be done by other Beth Israel employees when neither individual is on his or her working time, in employee-only areas — employee locker rooms and certain adjacent rest rooms.
>
> Elsewhere within the Hospital, including patient-care and all other work areas open to the public such as the lobbies, cafeteria and coffee shop, corridors, elevators, gift shop, etc., there is to be no solicitation nor distribution of literature.
>
> Solicitation or distribution of literature on Hospital property by *non-employees* is expressly prohibited at all times.
>
> Consistent with our long-standing practices, the annual appeal campaigns of the United Fund and of the Combined Jewish Philanthropies for voluntary charitable gifts will continue to be carried out by the Hospital.

[2] The Board found that Petitioner had committed an additional section 8(a)(1) violation by maintaining an overly broad no-solicitation, no-distribution rule prohibiting all solicitation and distribution in all areas to which patients, employees and visitors have access during non-working time other than *immediate patient care areas*. The Board cited its own decision in *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150, 91 LRRM 1333 (1976), decided subsequent to the Administrative Law Judge's decision in the case at bar, as authority for this conclusion.

authority of 28 U.S.C. § 2112 enforced the Board's order. *NLRB v. Beth Israel Hospital*, 554 F. 2d 477 (1st Cir. 1977), as to the cafeteria and coffee shop, but refused to permit the Board to extend its decision to other patient access areas without affording the parties an opportunity to litigate fully the question as it pertains to those other areas.[3]

Summary of Argument.

The Court of Appeals erred in granting enforcement to the Board's order in this case. The Court gave undue deference to the decision of an administrative agency which, in this instance, is acting both in disregard of the declared intention of Congress and outside its area of expertise. When it granted the National Labor Relations Board jurisdiction over non-proprietory health care facilities, Congress intended that special concern be shown for the needs of hospital patients. The Board has not accorded due weight to the unique considerations inherent in health care institutions which must act in consonance with the needs of their patients as those needs are perceived by those who possess the medical expertise which the Board lacks.

The Court of Appeals failed to require that the Board meet its burden of proof by articulating valid reasons for refusing to find that the special circumstances inherent in a hospital setting pertain to all patient care-patient access areas of the Hospital including the cafeteria. The Board cited no record evidence sufficient to support its decision. On the other hand, Petitioner clearly demonstrated that there do exist special circumstances which validate its rule. Union solicitation and distribution of literature has the po-

[3] Petitioner wishes to point out to the Court that after the events which gave rise to this litigation, substantial renovation work has been completed at Beth Israel Hospital. As a consequence of that renovation, the coffee shop has been eliminated.

tential to upset patients and/or their visitors wherever they are present and this is sufficient justification for the Hospital's ban on such activity in all patient and visitor access areas including the Hospital's cafeteria. In deciding that enforcement of such a ban violates the Act, the Board has shown a lesser regard for the well-being of hospital patients than it has for customers of a retail store or for diners in a restaurant.

Petitioner's rules regarding solicitation and distribution were not discriminatorily applied. Nor do they reflect any anti-union animus on the part of the Hospital, which has provided ample means of communication to employee organizers.

The Court of Appeals also erred in failing to consider the fact that Petitioner's cafeteria and coffee shop are commercial restaurant facilities. There is no reason why such facilities should not be viewed at least equally, nor why their customers should be afforded less protection from potentially upsetting elements because they happen to be sick persons or concerned visitors. Rather, a policy far different from that embraced by the Board in this case must be adopted so that the will of Congress can be given effect.

Argument.

I. The Board's Decision Impedes the Hospital's Ability to Perform Its Primary Function of Providing Optimum Care to Its Patients.

Hospitals, by the very nature of their primary function, must provide a therapeutic environment for their patients. The decision of the Board, enforced by the First Circuit, has impaired the ability of the Hospital to provide complete medical care and has infringed upon the

rights of innocent third parties. It is left to this Court to formulate guidelines to govern the question of solicitation and distribution of union literature in a hospital and its environs so as to insure that the rights of those innocent third parties, hospital patients, are protected.

A. *The First Circuit Erred in Giving Deference to the Board's Decision Which Is Contrary to Congressional Purpose and Which Is Outside the Board's Area of Expertise.*

Although the Court of Appeals for the First Circuit pointed out that it has limited power of judicial review of a decision of an administrative agency, it erred by overemphasizing the constraints upon its authority. It would make little sense to provide for review of the decisions of administrative tribunals if reviewing courts are to be bound to give force to those decisions even where, as here, they are unsupported by either Congressional policy, agency expertise, or record evidence. In refusing to enforce the National Labor Relations Board order in the very case which established Board doctrine on the matter which is now before this Court, the Tenth Circuit pointed out that:

> Since the intermingling of patients and employees in patient access areas of the Hospital, even under the Board's rationale, is a "special circumstance" operating to dispel the presumption of illegality associated with restrictions on solicitation during working time, we are not required "to stand aside and rubber stamp" the "balance" struck by the Board in allowing solicitation in some patient access areas but not others. Rather it is our duty to review this balance to determine whether the accommodation reached by the Board is reasonable in light of expressed con-

> gressional policy and the commonly accepted circumstances attending modern hospital care.

St. John's Hospital and School of Nursing, Inc. v. NLRB, 557 F. 2d 1368, 1373-74 (10th Cir. 1977), *denying enf. to* 222 NLRB 1150, 91 LRRM 1333 (1976).

In a very recent and as yet unpublished decision, the District of Columbia Circuit in *Baylor University Medical Center v. NLRB*, No. 76-1940 (D.C. Cir. February 14, 1978), stated its view that:

> In reviewing an order by the NLRB, courts must accept its determinations if they are supported by "substantial evidence," and give considerable deference to the Board's interpretation of the terms of the NLRA. In this case, however, we find that the Board's decision is both contrary to congressional purpose and outside the Board's area of expertise, and accordingly entitled to little of the deference traditionally accorded to NLRB actions. While we are not at liberty to deny enforcement to an order of the Board merely because we would have favored a different result, we feel no hesitation in denying enforcement to the instant order.

Id. at 6-7 (footnotes omitted).

The case at bar, in which the Board is attempting to enforce the doctrine rejected upon review by the *St. John's* and *Baylor* courts, presents the same circumstances which justified those courts in refusing to rubber stamp the Board's view. The First Circuit should have acted in a similarly responsible manner in fulfilling its duty to correct administrative error.

First, it must be noted that the policy of the Board in formulating solicitation and distribution rules which focuses solely on the needs of employer and employees, giving

little heed to the right of sick persons to obtain quality health care provided in accordance with sound medical judgment, is contrary to Congressional intent. The Board's decision, enforced by the First Circuit, represents an abandonment of the responsibilities conferred upon the Board by Congress when it extended the coverage of the Act to employees of non-proprietary health care institutions in 1974. Pub. L. No. 93-360, 93d Cong. 2d Sess. (July 26, 1974), 29 U.S.C. § 152(2) and (14). Congress, in enacting the 1974 Health Care Amendments, acted not only in recognition of the interests of hospital employees. It is clear that Congress was also concerned with patients' well-being in a health care institution. This is made plain by examination of the Act itself and of the relevant legislative history. *See, e.g.,* Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974 (hereafter "Legislative History"), Pub. L. No. 93-360 (S. 3203), prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, pp. 10, 13. *See generally,* Hearings on H.R. 11357 Before a Subcomm. of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. (1972); Hearings on H.R. 11357 Before a Subcomm. of the House Comm. on Educ. and Labor, 92d Cong., 1st and 2d Sess. (1972).

The following comments in the legislative history of Public Law 93-360 confirm the overriding Congressional concern that the self-organizational activities of health care employees not be allowed to "disrupt the continuity of patient care":

> In the Committee's deliberation on this measure it was recognized that the needs of patients in health care institutions required special consideration in the

> Act. . . . S. Rep. No. 93-766, Legislative History, p. 11.
>
> Many of the witnesses before the Committee, including both the employee and the employer witnesses, stressed the uniqueness of health care institutions. *There was a recognized concern for the need to avoid disruption of patient care* **wherever** *possible.*
>
> It was this sensitivity to the need for continuity of patient care that led the Committee to adopt amendments with regard to notice requirements and other procedures related to potential strikes and picketing. S. Rep. No. 93-766, 93rd Cong., 2nd Sess. reported in 1974, 2 U.S. Code & Admin. News, 3946, 3951 (emphasis supplied).

Congress allowed for organization and representation of health care employees only upon the expectation that the Board would take care to safeguard the rights and interests of patients. It is clear from the decisions of the Board in *St. John's Hospital & School of Nursing, Inc., supra,* and in other cases such as this one, decided in accord with *St. John's* that that expectation remains unfulfilled. By limiting the scope of rules barring solicitation and distribution to immediate patient care areas only, the Board has exhibited its lack of sensitivity to the special concerns involved in providing medical treatment.

The District of Columbia Circuit in *Baylor University Medical Center v. NLRB, supra,* recognized that this abandonment of the responsibilities placed upon the Board by Congress mandates that a reviewing court refuse to give effect to irresponsible action. That court noted that:

> The legislative history of the NLRA as it applies to voluntary, non-profit hospitals reveals an unmistakable solicitude for the peaceful functioning of these

institutions, even at some expense to employees' right to organize. It was not until 1974 that such institutions—which employ some 55% of all hospital workers—were included within the NLRA, and in the course of amending the scope of the Act's coverage Congress clearly evinced its belief that these facilities presented special problems which mandated a different approach to the application of the NLRA than that taken in other fields.

Id. at 7-8. (footnotes omitted.) The court also reasoned that:

> . . . the clear expressions of congressional concern for avoiding disruptions in the hospital environment that we do find in the legislative history encourages us to give special weight to the needs of patients in striking a balance between preventing possible sources of disruptions in hospitals and protecting employees' right to organize. Moreover, it seems clearly preferable in resolving any doubts as to how best to accommodate these conflicting interests to err on the side of protecting the patients—to whom irreparable injury might be done—rather than on that of a labor organization which can at worst suffer a brief, albeit unjustified delay.

Id. at 8-9 (footnotes omitted).

A second factor disregarded by the First Circuit is that in dealing with issues involving sick persons and the environment in which they are to receive treatment, the Board is operating outside of its own area of expertise. In cases such as the instant case involving solicitation and distribution, the Board is attempting to apply standards which were developed for industry to the non-industrial setting of the nonprofit medical care facility. The Board is mistaken in that attempt, for a health care institution is a special

type of employer, one to which rules geared to application in an industrial setting cannot be mechanically applied. It is important to consider, and Congress intended that the Board consider, that the health care "industry" is different from other industries with which the Board is more accustomed to dealing. When it extended the jurisdiction of the NLRB to encompass nonproprietary health care institutions, Congress expected that the agency would develop rules especially tailored to govern employee organization in the unique setting of a hospital. Contrary to the views expressed by the Board and by the First Circuit in this case, it was not expected that the Board would merely resort to an unthinking application of "well-settled" doctrines developed in "industrial" life no matter how ill-suited those doctrines prove to be for the health care "industry."

Coupled with this failure to recognize that the unique nature of a hospital places it outside the scope of the traditional area of NLRB labor relations expertise is the Board's insistence on rendering decisions on matters which are essentially medical in nature without the slightest modicum of medical expertise, often without even the benefit of expert medical testimony. If an administrative agency is acting in regard to matters which lie outside the area of its expertise, then there is no mandate that a reviewing court defer to the decision of the agency. This premise was correctly perceived by the Tenth Circuit in deciding the *St. John's Hospital and School of Nursing* case, *supra,* as it said:

> We are therefore compelled to conclude that the ultimate factual inferences on which the Board's distinction was based were drawn not from the record evidence but rather from the Board's own perceptions of modern hospital care and the physical, mental, and emo-

tional conditions of hospital patients—areas outside the Board's acknowledged field of expertise in labor/management relations.

• • •

Since the intermingling of patients and employees in patient access areas of the Hospital, even under the Board's rationale, is a "special circumstance" operating to dispel the presumption of illegality associated with restrictions on solicitation during working time, we are not required "to stand aside and rubber stamp" the "balance" struck by the Board in allowing solicitation in some patient access areas but not others. Rather it is our duty to review this balance to determine whether the accommodation reached by the Board is reasonable in light of expressed congressional policy and the commonly accepted circumstances attending modern hospital care.

557 F. 2d at 1373-74.

There are numerous factors which demonstrate the Board's lack of expertise in this area.[4] One example is the Board's abandonment of the rule endorsed in *Guyan Valley Hospital, Inc.*, 198 NLRB 107, 81 LRRM 1023 (1972), which recognized a *tendency* to disturb patients as justification for the enforcement of a no-solicitation rule in public areas of a hospital. It should not go unnoticed that Congress, in extending the coverage of the *Act* to nonprofit hospitals, chose not to disturb the Board's handling of solicitation in the hospital setting as expressed in *Guyan Valley*. Thus, while it enacted special provisions

[4] For example, see *A.T. & S.F. Memorial Hospitals*, 234 NLRB No. 65, 97 LRRM 1314 (1978), where the Board reversed an Administrative Law Judge and found that "the no solicitation rule is invalid to the extent that it applies to the intensive care unit", which the Judge had found was both a working area of the hospital and an immediate patient care area.

on bargaining and bargaining units, strikes and picketing and directed the Board to give hospital cases priority handling, (S. Rep. No. 93-766, Legislative History, pages 11-14), it left untouched the Board's *Guyan Valley* doctrine governing hospital solicitation. This aspect of the Board's approach to regulation of organizational activity in nonprofit hospitals proved bothersome to the court in *Baylor University Medical Center* v. *N.L.R.B., supra,* which indicated its approval of the now-rejected Board doctrine by quoting from *Guyan Valley*, adding a pertinent comment. Said the court:

> Wherever in the hospital an emotionally vulnerable group of patients and their visitors may be present, we feel that unique considerations come into play which justify an otherwise overly broad no-solicitation rule.
>
> [I]t must be remembered that Respondent's facility is not a manufacturing plant, it is a hospital. And it is in the nature of hospitals that certain of the working areas (hallways, elevators, stairs, patient's rooms, gift shops, etc.) are necessarily open to the use of patients and visitors. . . . Further, the hospital services ill individuals who, in their weakened condition may readily be upset if they overhear antiunion-prounion arguments . . . .
>
> *Guyan Valley Hospital,* 198 NLRB 107, 111 (1972).
>
> It is surprising that the NLRB changed its own established viewpoint on this matter so utterly, and we find its now repudiated analysis more appropriate than its present position in the instant case.

Id. at p. 13.

Also indicative of the Board's lack of expertise is the finding, without supporting evidence, that ambulatory pa-

tients are somehow less susceptible to trauma than are patients confined to their rooms.

Under these circumstances, one must question whether the Board is in fact entirely free to cast aside prior rulings and to adopt new policies. While that rubric may well apply in many instances, it would seem that the Board is at least precluded from altering policies where the effect of such action cuts contrary to the intentions expressed by Congress. Rather than cursorily approving this shift in approach which can produce the sort of adverse consequences which Congress sought to avoid, one would expect reviewing courts to provide corrective direction to an agency which has strayed beyond the bounds intended by Congress. The approach of the Court of Appeals for the Sixth Circuit in *NLRB v. Summit Nursing Convalescent Home,* 472 F. 2d 1380 (6th Cir. 1973), *denying enf. to* 196 NLRB 769 (1972) is instructive. In that case the Board had overturned the decision of its Trial Examiner who had upheld a no-solicitation/no-distribution rule which applied in all patient or public areas within the home on the basis that the rule was necessary to maintain efficient operations in the nursing home.[5] The Board held that it could find no extraordinary circumstances justifying such a broad rule. The Sixth Circuit refused to enforce the Board's order and said:

> Based on all the facts and circumstances disclosed by the record in this case, the Court finds that the rule

[5] The rule stated:

> In order to give our undivided attention to the job of caring for our patients, no employee shall engage in solicitation for any cause or distribute literature of any kind during an employee's working time at any place in the home. No employee should engage in solicitation or distribution of literature at any time in the patient or public area within the home, or in the nurses' stations. No employee shall distribute literature for any cause in working areas of the home, at any time.

> published and promulgated by respondent which is set out therein is reasonable and the Board should have adopted the decision and recommended order of the Trial Examiner. *Id.* at 1380.

It is an unfortunate circumstance, calling for corrective action by this court, that the First Circuit misapplied the notion of judicial constraint in rendering its decision in this case.[6] The decision of that court to enforce the Board's order in respect to the cafeteria and coffee shop is erroneous in that the court failed to give heed to its own concerns as to the propriety of Board action in regard to applying the *St. John's* doctrine. In refusing to permit the Board to expand the scope of its order beyond the cafeteria, the Court of Appeals said:

> We are also constrained to give a narrow reading to the Board's decision and order in view of the fact that the Board has only recently been given jurisdiction over non-profit hospitals. The law affecting solicitation and distribution in these hospitals is still largely undeveloped and we think that it would be particularly inappropriate for the Board to be adjudicating patients', hospitals' and employees' rights in as cursory a fashion as would be indicated by giving a broad reading to footnote 2 in this case.

554 F. 2d at 482.

Thus, it is the responsibility of this Court to direct the Board toward implementation of a policy which gives

[6] The District of Columbia Circuit in *Baylor University Medical Center, supra,* stated:

> Petitioner *aptly* suggests that the First Circuit in relying on the NLRB ruling in *St. John's Hospital* could not have realized how scant the evidence on which that decision was based had been.

Id. at p. 20, n.62 (emphasis supplied).

some measure of attention to the rights of patients to beneficial health care. Integral to that policy must be recognition of the fact that it is the Hospital which possesses the medical expertise required to determine what rules are necessary to preserve the medical well-being of persons under its care. Such a re-direction of the Board toward a policy which better manifests Congressional intent is well within the power of this Court and is called for under the circumstances of the case at bar.

B. *The Board Did Not Meet Its Burden of Proof Because of Its Failure to Articulate Persuasive Reasons for Its Decision, Which Was Not Supported by Substantial Evidence.*

It is clear that even under the standards developed in the ordinary industrial setting for assessment of the validity of no-solicitation and no-distribution rules the First Circuit erred by failing to require the Board to satisfy the burden placed upon it.[7] Section 7 of the Act, 29 U.S.C. § 157, grants employees a twofold statutory right, the right to engage in or to refrain from self-organization. This two-edged guarantee is protected by sections 8(a)(1) and 8(b)(1) of the Act. 29 U.S.C. §§ 158(a)(1) and 158(b)(1). In addition to employee rights, the Act recognizes the right of an employer to control the use of its property to maintain order and discipline in its business establishment. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). The Board and the courts attempt to maintain an accommodation between employee-employer rights with as little "destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

[7] See n.6, *supra*.

The Board has developed rules as basic postulates to be applied in testing the propriety of no-solicitation, no-distribution rules. Employees may be prohibited from soliciting during working time and from distributing literature in working areas during working and non-working time. *Seng Co.*, 210 NLRB 936, 86 LRRM 1372 (1974). A rule forbidding distribution by employees in non-working areas during non-working time is presumptively invalid, and a rule prohibiting union solicitation by employees during non-working hours is presumptively invalid, even if limited to working areas. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 51 LRRM 1110 (1962). A presumptively invalid rule may become proper if the employer can demonstrate "special circumstances" to justify its promulgation and enforcement.

However, in the present case, since a hospital is involved, it was not necessary for the employer to demonstrate the existence of "special circumstances" to justify its rule. As the Board itself has recognized in its *St. John's* decision, 222 NLRB 1150, 91 LRRM 1333 (1976), the unique nature of a hospital setting is in and of itself a special circumstance justifying a restriction on solicitation and distribution activity. Thus, given the existence of special circumstances, there is no presumption of invalidity of the rule for Beth Israel Hospital to overcome. The burden is on the Board to justify its decision holding that the Hospital violated the Act by enforcing that rule. This the Board failed to do and in enforcing the Board's order despite that failure, the Court of Appeals erred. The proper course for the Court would have been to compel the Board to articulate logical reasons to justify its illogical view that the unique setting of a hospital, *i.e.* its own conceded special circumstance, somehow ceases to operate as such in areas where patients and visitors have access.

As the Tenth Circuit correctly viewed the burden to be met by the Board:

> Once it is admitted that union solicitation is disruptive of the tranquil atmosphere essential to the Hospital's primary function of providing quality patient care and may be unsettling to patients who are seriously ill and thus in need of quiet and peace of mind, it is unreasonable to conclude that these adverse effects of union solicitation will occur in some patient access areas but not in others. As demonstrated above such a distinction is totally unsupported by the record evidence and involves medical and administrative judgments outside the Board's acknowledged area of expertise.

St. John's Hospital and School of Nursing, Inc. v. NLRB, 557 F. 2d 1368, 1374 (10th Cir. 1977).

As the Circuit Court of the District of Columbia stated in *Baylor University Medical Center v. NLRB, supra*:

> [C]ertainly the imposition of any additional sources of potential disruption should only be required reluctantly and after a far more detailed analysis than the NLRB devoted to this particular case.

Id. at pp. 9 and 10.

The Board has shown no valid reason for distinguishing between patients and their visitors. The upset and discomfort in regard to health care of one may be expected to be communicated to the other. Even more crucial, however, is the Board's failure to demonstrate that the considerations regarding health care and patient disruption which make a hospital setting a special circumstance in itself are not present in patient access areas such as the cafeteria. To sustain its burden and to validate its decision, the Board must demonstrate by substantial evidence that it would be improper for the Hospital to enforce its rule in the cafeteria. *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951). Rather than provide such proof, the Board has offered a non-medical theory, adopted by the First Circuit, apparently based on a conjectural distinction between ambulatory and non-ambulatory hospital patients. The key tenet of the Board's doctrine is that the place in which a patient is subject to disquieting elements is, somehow, significant. There is, however, no record evidence to support a distinction that those patients in the cafeteria are somehow less susceptible to trauma than are these same patients while in their rooms or in other areas of the Hospital. Instead, pure common sense indicates that any disruption in a hospital setting can be traumatic to a patient's health, whether the disruption comes from the activities of employees situated within a patient's room or while he is visiting with his children in the hospital cafeteria. It really makes little difference where the disruption occurs, since it is the nature of the activity which creates patient anxiety, unrest or emotional distress.[8]

This flaw in the Board's reasoning has been noted by the courts of other Circuits.

In *St. John's Hospital and School of Nursing, Inc. v. NLRB, supra,* the Tenth Circuit said:

[8] This insistence by the Board that rules governing solicitation and distribution in a hospital be drafted according to illogical lines of demarcation accounts for the fact that litigation involving Beth Israel Hospital's no-solicitation/no-distribution rule is in its present undesirable procedural posture. The validity of the rule as applied in patient care areas other than the cafeteria and coffee shop is now being litigated in administrative channels. There is, in fact, no sound reason for the Board's decision so to structure this litigation, for there exists no significant factors to distinguish the cafeteria from other patient access areas.

> We are convinced, however, that Congress was deeply concerned with the "need to avoid the disruption of patient care *wherever possible*" and that this concern was not limited to those areas in which specific statutory exceptions were enacted. Accordingly, we conclude that the needs of hospital patients are to be afforded considerable weight in striking the appropriate balance between the undisputed rights of hospital employees to engage in self-organizational activities and the equally undisputed right of the Hospital to maintain services, order, and discipline in its operations.

557 F. 2d at 1374 (emphasis in the original).

The Seventh Circuit has taken a similar position on this issue. In enforcing an order of the Board upon a factual record differing from that developed in the case at hand, the court explained:

> Petitioner also challenges the Board's decision in this case on the basis of the primary ground relied upon by the Tenth Circuit for denying enforcement in *St. John's*: that the Board's conclusion, that the interests of patients well enough to frequent areas such as cafeterias and lounges is outweighed by the interests of employees in those areas, is erroneous because it is based on the faulty assumption that ambulatory patients are better able to endure any unsettling effects of solicitation and distribution than patients who are confined to their rooms. We agree with petitioner and the Tenth Circuit that this distinction is unsound. In many cases ambulatory patients are far sicker than confined patients. For example, it is implausible to suppose that a person with leukemia who is able to walk to the cafeteria is better able to accept stress than a person confined to his bed with a fractured leg. Thus, if the Board's decision rested on this reasoning alone, it could not be upheld.

Lutheran Hospital of Milwaukee, Inc. v. NLRB, 564 F. 2d 208, 215 (7th Cir. 1977). And, in an Administrative Law Judge's decision in a case related to the case at hand, *Beth Israel Hospital* (Decision of Administrative Law Judge dated December 14, 1977),[9] it was stated that:

> The fact that a patient is ambulatory, i.e., able to walk about on his own, furnishes no indicium as to the seriousness of his illness. Ambulatory patients may be quite sick. All patients who do not die are ambulatory at some stage of their stay in Beth Israel.

Decision of December 14, 1977 at p. 3; p. 49, *infra*.

In light of the fact that psychiatric outpatients frequent the cafeteria, dressed in street clothes, the Board's distinction between ambulatory and non-ambulatory patients as a basis for the "immediate patient care area" formula may be said to serve as an indication that the Board lacks expertise in regard to the operation of health care institutions. The fact that the Board provided no medical evidence to support that distinction illustrates the failure of the Board to carry its burden of proof.

C. ***Even Assuming that Petitioner Bears the Burden of Proof, Petitioner has Met Its Burden by Evidence of the Existence of Special Circumstances in the Cafeteria and Coffee Shop.***

The Court of Appeals not only erred in failing to hold the Board to its burden of proof, it compounded its error

[9] This case is unreported and pending on exceptions before the National Labor Relations Board. The decision is set forth in the addendum of this brief.

by failing to credit Petitioner with having met the burden it was improperly forced to shoulder. The Hospital made all of the proof it was required to make, indeed all that it could possibly make, by showing a concurrence of three factors: (1) patient and visitor use of the cafeteria; (2) union activity in that area including the distribution of material which disparaged the quality of health care at the hospital and (3) established Board precedent that such solicitation and distribution of literature is potentially disruptive.[10] Under established Board precedent, even in a non-hospital setting that potential for disruption is a sufficient basis for a finding that a ban on such activity is justified; therefore Petitioner showed that its obligation to provide patient care in accordance with the dictates of sound medical practice constitutes a special circumstance which validates its rule regarding solicitation and distribution. This obligation entails a technical curing function and a human caring function twenty-four hours a day. The duty of patient care does not terminate once the patient enters the cafeteria or coffee shop. Rather, it is an around the clock operation. The primary concern of the Hospital is the care of its patients and under no circumstances may patient care be compromised. The no-solicitation and no-distribution rules are directed to that end.

It cannot be denied that union solicitation in the cafeteria creates the possibility of upset of patients and visitors in that area. This possibility clearly justifies the Hospital's ban on such activity. There is ample evidence in the record that the cafeteria was used by large numbers of patients (J. Ex. No. 25). These patrons include

[10] "[S]olicitation, if carried on . . . where customers are normally present, might conceivably be disruptive of the respondent's business." *Marshall Field & Co.*, 98 NLRB 88 (1952), *enf.*, 200 F. 2d 375 (7th Cir. 1952), *et. seq.*, cited *infra* at p. 30.

outpatients (Tr. 90), psychiatric inpatients and outpatients (Tr. 91, 104), and several who frequent the cafeteria dressed in bedclothes, with intravenous tubes attached (Tr. 75).[11]

The patients who use the cafeteria do so for many reasons. In the case related to the instant litigation noted above, wherein the validity of the same rule as enforced by the same employer was involved, the Administrative Law Judge found that (patients) utilize the services of the cafeteria not only as a place to get something to eat but as a place where they can see their children who are forbidden by hospital rules to visit them in their rooms.

Beth Israel Hospital, Decision of Administrative Law Judge dated December 14, 1977 at p. 2; p. 48; *infra. See also* J. Ex. No. 24 at p. 8 (A. 121).

That it is necessary to insulate patients from possible sources of disruption, wherever such possibility exists, is a basic precept of the medical philosophy of the Hospital. This policy is merely one facet of Beth Israel's overall concentration on providing total care for the patient.

This Hospital is recognized as being in the forefront of the nation's health care institutions in preserving patient rights (R. Ex. No. 2, A. 135). Every new employee at Beth Israel Hospital is given a copy of the pamphlet, "Your Rights as a Patient at Beth Israel Hospital" (R. Ex. No. 1; A. 41). Additionally employees are made aware of such a publication in employee meetings and in the employee newsletter. The widespread dissemination of the "Patients' Rights" pamphlet and the explanation of the contents therein to employees demonstrates that patients too have rights which must be taken into account (A. 44-45). Patients are given

[11] The concurrent use of the cafeteria and coffee shop by large numbers of patients, visitors, and employees is also indicated by the information booklets distributed to patients (J. Ex. No. 24, p. 12, A. 120) and to employees (J. Ex. No. 1, p. 22, A. 55).

a patient information booklet (J. Ex. No. 24, A. 120; Tr. 17) and the patients' rights booklet. Two particular rights are considered vital: the patient's rights to privacy (R. Ex. No. 4, A. 139; A. 41) and to total quality medical care. In this atmosphere, then, it can hardly be considered unwarranted for the Hospital to seek to protect its patients from unsubstantiated charges disparaging the quality of health care, such as were contained in the union pamphlet "As We See It" (J. Ex. Nos. 18A, *et seq.*, A. 76). The speculative conclusion that ambulatory patients, well enough to frequent public areas of the hospital, are highly unlikely to be harmed if they happened to read the union literature is another example of the Board rendering medical judgments without the benefit of medical expertise or of medical evidence in the record. In fact, visitors and patients exposed to union literature attacking the quality of patient care provided by the hospital and applauding work stoppages may well become anxious and apprehensive. *Beth Israel Hospital,* Decision of Administrative Law Judge dated December 14, 1977. Addendum.

Contrary to the view of the Board, any fair reading of that material compels the conclusion that patient trauma would be highly *likely* to occur upon reading that the administrators of the Hospital ". . . don't give a damn about the patient care and shouldn't be working in a hospital in the first place . . ." (J. Ex. No. 18L, A. 99). It is appropriate to contend that a patient's mental and emotional well-being might receive a jolt upon being informed that alleged understaffing has led to the complaint of a purportedly overworked nurse who asks:

> How often are you knowledgeable of the medical status of your patients? When a relative or friend of a patient asks you "How is she/he feeling?", can you really answer the question? (Often I'll know if the patient has voided or eaten well, but she/he may have impending congestive heart failure for all I know.) There are times when I can skim through the patients' charts, but that opportunity should occur with every patient who is under my care. Even though I've become somewhat adjusted to it, I still resent knowing usually only the medical diagnosis stated in the Kardex.

(J. Ex. No. 18M, A. 107). And must the Hospital accept the consequences of complying with an order based on the "medical" judgment of the Board and the First Circuit that a maternity patient at Beth Israel would be highly unlikely to be harmed by reading the account of a "Successful Birth In Spite of BI" printed in "As We See It"? That article contained such assertions as the following:

> At 8:15, the doctor came in, but I couldn't turn over because I was in too much pain, so she left without examing [sic] me. I wanted to vomit. My stomach was hurting, my back was hurting, but she said, "Well, she's all right," and she left. She went home, and it seems that she didn't tell the next doctor on duty what was happening to me.
>
> A nurse came in and asked me where it hurt. Where else would it hurt but my stomach? I was in too much pain to answer her, so she left.
> A few minutes later, my water broke. I didn't know what it was because it was my first kid, and then my baby tried to come out all by himself. I screamed, and another nurse came in and rushed me to delivery. Then a doctor who didn't know what was going on with me came in and finished the delivery. I heard him say, "But I don't know anything about the patient."
>
> . . .

> They tried to cheat me out of my maternity leave, overcharged me, and totally ignored me while I was a patient. My experience was bewildering, painful, and ugly. I was lucky it wasn't a complicated delivery. Don't ever have a baby here unless you have a private doctor.
>
> A BI Employee

(J. Ex. No. 18D at pp. 5-6, A. 76).

Actual patients of Beth Israel have expressed the feeling that it is upsetting to overhear discussions of patient care matters by doctors (R. Ex. No. 3(b) at p. 2, A. 137). To hold that these patients would not be likely to be upset by exposure to the types of allegations regarding patient care as were contained in "As We See It" is contrary to the evidence and to simple logic.

It cannot be denied that union solicitation in the cafeteria might prove upsetting to patients in that area. Employee Schunior, who was warned for violating this rule (J. Ex. No. 17, A. 75), claimed to be able to differentiate between employees and patients. Yet, even she admitted that she was not aware that psychiatric outpatients used the cafeteria until after she was ordered to cease her activity (A. 42). It is precisely this type of patient that the Hospital must take steps to protect from disturbing elements. Moreover, several of the indicia upon which Schunior claimed to rely in distinguishing between employees and patients, while soliciting, *e.g.*, clothing and identification bracelets, were shown to be not present in many instances (A. 51, 52). In any event, the Hospital cannot expect that all employee-solicitors would possess Schunior's uncanny ability to differentiate among cafeteria users. More importantly, Petitioner cannot be expected to assume the same risk of harm to patients should Schunior make a mistake in identification that Schunior herself is willing to assume.

It is Petitioner, not Schunior, or the union or the Board, which is charged with ultimate responsibility for the well-being of its patients. To compel Petitioner to risk traumatization of its patients who venture into the cafeteria is to impair its ability to provide patient care in accordance with sound medical practice.

It is not a matter of speculation that union solicitation can be upsetting to patients. In fact:

> Adult human beings become childlike, vulnerable, and irrational when they are sick. From a patient's point of view, the ideal hospital environment is one of quiet professionalism, efficiently organized, which is directed to his needs. Solicitation and distribution in 15 patient access areas[12] can interfere with patient care functions. Such activity can be disturbing to patients and their families, persons who are particularly susceptible to being disturbed. Such disturbance can interfere with Beth Israel's primary function of curing illness.

Beth Israel Hospital, supra, Decision of Administrative Law Judge dated December 14, 1977 at p. 3.

A similar finding was made by the Court of Appeals for the District of Columbia Circuit in its recent, unpublished opinion in *Baylor University Medical Center* v. *N.L.R.B.*, No. 76-1940 (D.C. Cir. February 14, 1978). The court said:

> It is not only the likelihood that congestion and commotion would result from such solicitation, but also the inherently disturbing effect of interjecting undertones of labor disputes into a situation where sick persons are totally dependent on the unflagging assistance

[12] The number "15" appearing in this line is apparently a typographical error. A motion has been made to correct that error, and that motion is pending before the Board. *See* addendum.

> of others that are major factors contributing to the disruptive effect of solicitation. Wherever in the hospital an emotionally vulnerable group of patients and their visitors may be present, we feel that unique considerations come into play which justify an otherwise overly broad no-solicitation rule.

Id. at p. 13.

Thus, it must be concluded that union activity in patient access areas such as a cafeteria presents a risk of interference with the care of patients. Yet, the decision of the Court of Appeals, enforcing the Board's order, would require the Hospital to demonstrate actual harm, *i.e.*, a setback in the recovery of a patient, before it could justify a ban on disturbing activity. 554 F. 2d at 481. Such an approach features the wholly unacceptable element of experimentation with the health of innocent third parties. Moreover, this decision represents a severe departure from the Board's attitude toward other types of employers whose labor relations must be conducted in accommodation with third parties. The decision in the case at bar illustrates the disturbing fact that, rather than give special attention to the rights of hospital patients, the Board has refused to accord them even the same rights as have been given to customers in a department store or to patrons in a restaurant.

In department stores and similar retail businesses it has been held that solicitation in the store's public areas, such as selling floors, elevators, corridors, and public restaurants, where employees and customers interact, may be forbidden at all times. *Marshall Field & Co.*, 98 NLRB 88 (1952), *enf.*, 200 F. 2d 375 (7th Cir. 1952). The reason for the exception to the general rule is that solicitation where customers are normally present *might conceivably* be disruptive of the respondent's business. *May Department*

Stores Co., 59 NLRB 976 (1944), *enf. as mod.*, 154 F. 2d 533 (8th Cir. 1946), *cert. denied*, 329 U.S. 725 (1946).

In a restaurant setting the Board has held that a no-solicitation rule enforced by an employer on a public restaurant's premises did not violate the Act since "[u]nder [the] circumstances union solicitation in the restaurants *is as apt* to disrupt the [employer's] business as is such solicitation carried on in any other [part] of the store in which customers are present" (emphasis supplied). *Goldblatt Bros., Inc.*, 77 NLRB 1262, 1264, 22 LRRM 1153 (1948). A ban on solicitation limited to *public* areas of a restaurant, such as customer or sales areas, during working or non-working time is valid (emphasis supplied). *See Marriott Corp. (Children's Inn)*, 223 NLRB 978, 92 LRRM 1028 (1976).

Another decision of the Board involving a restaurant situation, *Bankers Club, Inc.*, 218 NLRB 22, 89 LRRM 1812 (1975), amply illustrates the approach adopted by the Board when the third parties involved are diners. In an opinion approved by the Board, the Administrative Law Judge stated:

> The Board has long approved employer rules prohibiting all solicitation, even during employees' nonworking time, in the selling areas of stores and other establishments, such as restaurants, on the theory that such activity might *tend* to drive away customers.
>
> . . .
>
> In the case of restaurants or other establishments where customers are present it is their presence and the *likelihood* of their being exposed to union activities that creates the "special circumstances" that justify infringing on employees' basic rights.

218 NLRB at 27 (emphasis supplied). In regard to distribution, the same considerations held sway:

> [L]iterature in the customer area not only might create a litter problem, but might also antagonize customers who find and read a discarded copy. Whatever short- or long-run ill effects on customer appetite or patronage might flow from a flyer advocating a boycott of lettuce or grapes, not to mention one attacking Respondent's labor policies — with or without recommendations — I cannot say but *Respondent should not have to bear the risk* of any when there are other areas for distribution in the restaurant. I find that the no-distribution portion of the rule is not overly broad and illegal.

Id. (emphasis supplied).

Almost unbelievably, the Board has rationalized the less stringent burden of justification placed upon restaurant operators than is imposed upon a hospital on the ground that union activity could tend to upset the digestion of restaurant patrons. In *McDonald's Corp.*, 205 NLRB 404, 84 LRRM 1316 (1973), it was found that:

> [t]here is no probative or substantial evidence that union or other solicitation would not be obvious to Employer's customers. Some solicitation might result in a pleasant and informative chat between the employees on their nonwork time in working areas. On the other hand, it might lead to a bitter exchange of insults or worse, the latter *not being likely to be conducive to good digestion* by Employer's hopefully otherwise happy customers."

205 NLRB at 407, p. 18 (emphasis supplied). Nevertheless, no such concern is exhibited by the Board for patient-patrons of a hospital cafeteria who undoubtably suffer from much more severe disorders than mere indigestion. As the

Tenth Circuit observed in *St. John's Hospital and School of Nursing v. NLRB, supra*:

> The question thus presented, to strike an acceptable balance between employee solicitation under the Act projected against the concept of hospital patient care, is indeed difficult. A cautious judgment in such regard must note that error in such judgment may cause irreparable damage to patients, and thus to the public, while error in the other direction can be salvaged by the Board under proper use of its overall expertise in labor matters.

557 F. 2d at 1371.

The Board's position, however, as illustrated by the decision in the present case, is that employers in the business of caring for sick persons are to be held to a stricter standard than are employers selling clothing or hamburgers. This decision, enforced by the First Circuit, flies in the face of good common sense.

In any event, it is clear that a policy which permits no-solicitation rules where the activity might upset retail customers or restaurant patrons but which prohibits such rules unless a harmful effect upon sick persons is actually shown hardly reflects a recognition by the Board of the concerns expressed by Congress in permitting the Board to assume jurisdiction over hospital employees.

More restrictive no-solicitation, no-distribution rules are necessary in a hospital cafeteria and coffee shop in order to avoid the disturbance of the hospital's relationship with its patients in the course of providing health care. The Hospital contends that the retail store analogy is applicable because solicitation and distribution of literature in the cafeteria and coffee shop might undermine the tranquil atmosphere required in a hospital setting. Certainly,

if a customer in a store who is intent on buying merchandise is shielded from disruption, there are more compelling reasons why hospital patients and their visitors should be similarly protected. Customers in a retail store or restaurant who are distracted by solicitation or distribution activities are free to leave the premises never to return again. The customer need only endure a few moments of discomfort. In contrast, the patient in a health care facility usually remains for at least several days of treatment. Solicitation and distribution activities could thereby upset patients and their visitors for extended periods of time. Furthermore, unsubstantiated or unwarranted statements conveyed in this manner could readily abuse, if not destroy, the trust which patients and visitors place in the Hospital. Once a patient has been admitted to a hospital or nursing home, it is unlikely, given his state of health, that he would leave the facility and seek health care elsewhere.

In enforcing the Board's order, the First Circuit expressed the following view:

> This is not to say that the Board does not bear a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized.

554 F. 2d at 481. This method of proceeding may eventually result in the Board's promulgating the rule which will properly reflect its duty under the Act, but only at the incalculable cost of actual harm to suffering patients.

It is the duty of this Court to prevent such experimentation with the health and well-being of innocent third parties.

D. *Petitioner's No-Solicitation, No-Distribution Rule was Not Discriminatorily Applied.*

It is, of course, inappropriate for the Board to attempt to equate this type of potentially upsetting matter with the innocuous type of solicitation (blood drives, car pool lists, baby gifts, etc.) permitted in the cafeteria. It is the controversial, as opposed to noncontroversial, nature of the conversational or printed matter that is significant in considering the interest of hospital patients. It was this medical decision, falling outside the scope of Board expertise, that motivated the Hospital to decide to protect its patients from the potentially harmful effects of such controversial matters. Beth Israel Hospital has exhibited no desire to stifle its employees or to hinder their organizational efforts. It merely claims a right to decide that it is not in the interests of patients' medical well-being for those patients to be subjected to attacks against the quality of care they are receiving such as those put forth in the union literature.

This point was emphatically made by the court in *Baylor University Medical Center v. N.L.R.B.*, No. 76-1940 (D.C. Cir. February 14, 1978) which said that:

> Respondent points out that Baylor does allow solicitation for the United Fund and the American Cancer Society, as well as holding an occasional bake sale and benefit fair (a program designed to acquaint the employees with the benefits available to them). Respondent's Brief at 20-21; J.A. 173-181. The fact that Baylor permits such activities while banning other forms of solicitation does not, however, indicate illicit discrimination on the part of petitioner, as the

> solicitations which are permitted are manifestly non-disruptive and carefully controlled (the Cancer Society solicitation, for example, consisted only of a note included in each employee's paycheck) J.A. at 174, Testimony of Mr. Howard Chase. *These solicitations are part of a normal hospital operation and all lack the emotionally disturbing aspect of union solicitation* in that they could not conceivably raise fears in patients or visitors that they might not receive the best possible health care.

Id. at p. 10, n.29 (emphasis supplied).

Moreover, the Board's argument raising the issue of disparate treatment must be evaluated with recognition of the fact that many of the items mentioned as being publicized in the cafeteria, *e.g.* National Nutrition Week, a cost reduction drive and car pooling, must be categorized as being work related. The Board has held that communications regarding work related matters are proper, even in areas where solicitation and distribution are prohibited. *Rochester General Hospital*, 234 NLRB No. 44 (1978). In that case such activities included Red Cross postings, blood collections, and displays of pharmaceutical products and medical books. In addition, the Board has recognized that an employer may allow solicitation for particular charities while banning other types of solicitation. *Astronautic Corporation of America*, 164 NLRB 623, 65 LRRM 1161 (1967); *May Department Stores Co.*, 174 NLRB 770, 70 LRRM 1307 (1969).

E. *Ample Alternative Means of Communication Are Available to Employee Organizers.*

Petitioner submits that the availability of alternative areas of communication is not a relevant inquiry here.

First, in the directly analogous restaurant-retail store setting, the Board does not inquire into the availability of such alternative means of communication. Secondly, this case involves *employee* organizers. Employees are not to be judged by the same standards as non-employees. *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105 (1956). Petitioner contends that it need not bear the burden of proving that alternative channels of communication exist in order to sustain the validity of its no-solicitation, no-distribution rule.

Even if this were a relevant inquiry, and assuming *arguendo* that the Hospital must provide alternative access to its employees, it has been shown that employee organizers do have adequate opportunity to communicate both on and off hospital premises (A. 30-34; J. Ex. No. 31, A. 127).

Of course, any employer is entitled, under established Board doctrine, to communicate with its employees through external avenues such as pay envelope messages (A. 21) and newsletters (A. 42-43). The employer need not, however, make such channels of communication open to union organizers. *See NLRB v. Clark Phonograph Co.*, 176 F. 2d 341 (3d Cir. 1949). Nor must an employer use those avenues which are available to the union to establish their efficacy. *See Bonwit Teller, Inc. v. NLRB*, 197 F. 2d 640, 646 (2d Cir. 1952). The significance of this factor was not given sufficient credit by the Court of Appeals. *NLRB v. United Steelworkers of America, CIO*, 357 U.S. 357, 364 (1958). The proper approach is that adopted by the Tenth Circuit in *St. John's Hospital and School of Nursing v. NLRB*, 557 F. 2d 1368 (10th Cir. 1977), wherein it was explained:

> In the present case it is stipulated that 80% or more of the employees use the employee-only lunch-

room and cafeteria on a daily basis. It is further stipulated that there are numerous other employee-only areas such as lounges, locker rooms, restrooms, and parking areas in which unrestricted access to employees is permitted. Although not controlling, when this factor is considered in conjunction with the expressed congressional concern for protecting "patient care" wherever possible, the conceded fact that solicitation may be unsettling to patients, and the absence of any record evidence to support a distinction between the sensibilities of bedridden vis-a-vis ambulatory patients we are compelled to conclude that the balance struck by the Board is unsupported and unreasonable. In contrast the Hospital's restriction on solicitation in all patient access areas comports with the realities of modern hospital care, where the emphasis is on having the patient ambulatory as soon as possible and strikes a reasonable, easily applicable balance between the interests of the Hospital in maintaining the tranquil atmosphere essential to quality patient care and the self-organizational interests of the employees. We therefore deny enforcement of the Board's order insofar as it would permit solicitation in patient access areas.

Id. at 1375.

It is especially significant to note that in *Baylor University Medical Center v. N.L.R.B.*, No. 76-1940 (D.C. Cir. February 14, 1978), it was found that there were sufficient alternative areas provided for union solicitation so as to justify the ban on such activity in the cafeteria and corridors, even though that hospital provided much less indoor space for solicitation than does Beth Israel Hospital. *See* n.4 at p. 3.

F. *The Rule Is Not Reflective of Any Anti-Union Bias on the Part of Petitioner.*

That the no-solicitation rule is in no way indicative of any anti-union animus on the part of the Hospital is made abundantly clear by the fact that similar restrictions have long been placed upon the members of Beth Israel's professional staff. The message has repeatedly been conveyed to *all* who work at Beth Israel that patients are to be shielded from upsetting influences at all times and in all areas of the hospital. For example, in July of 1971 the medical staff was admonished that:

> Less attention is paid to form and content of other words we scatter about the Hospital. Unlike our output for the medical record, these words are often ingenuous yet more public and readily overheard, inevitably subject to misrepresentation. I refer to the casual conversation in the corridor or elevator, in the lobby or *cafeteria* line. More than once a visitor has been privy involuntarily to a conversation or fragment of commentary he is apt to appropriate as having relevance to the patient he is visiting. The effect can be devastating. Even our conventional jargon can be desperately unsettling when overheard, or involuntarily deprive a patient of a measure of privacy he should enjoy.

(R. Ex. No. 3(a), A. 136, emphasis supplied.)

Doctors were again advised, in July of 1973, that:

> Among the rights of patients we insist upon is the right to privacy. This includes not only the reassurance of privacy in the process of history-taking and physical examination and restriction of access to the

> information obtained thereby, but equivalent discretion to be exercised in the discussion of such privileged information among physician colleagues. Patients and visitors are often horrified to overhear — in elevators, *cafeteria lines,* nursing unit corridors and stairwells — what is to the engrossed clinician innocuous professional discussion. And when patients' names are mentioned or gratuitous commentaries added, the error is compounded manyfold. Please restrict the voicing of your clinical discussion to include none other than your intended audience.

(R. Ex. No. 3(c), A. 138, emphasis supplied.)

This evidence, coupled with the fact that employees are freely permitted to exercise their organizational rights in various areas of the hospital, serves to verify that the no-solicitation rule applied in patient access areas such as the cafeteria is merely one part of Beth Israel's overall policy concerning the necessity of freedom from upset as an element of total patient care. And it should be noted that the Hospital has acted consistently in this regard. (Compare existing rule in fn. 1 herein with prior rule, J. Ex. No. 5, A. 63.) Although a modification of the rule was effectuated as a result of litigation before the Massachusetts Labor Relations Commission, it remained the view of Beth Israel, based on its medical expertise, that solicitation activity is disruptive of patient care. Thus, when the Union sought to take advantage of newly created federal jurisdiction to expand upon the state Commission's order (J. Ex. No. 15, A. 71), Beth Israel Hospital reverted to its ban on all solicitation and distribution of literature in the cafeteria and other public areas. The Hospital had thus hoped to satisfy the dual goals of protecting its patients from upsetting influences while securing review by the Board and the courts, including this Court, of the broad

question of the validity of a total ban on solicitation and distribution in areas of a hospital to which patients and visitors have access.

This consistent concern for the well-being of its patients is also shown by the fact that Beth Israel Hospital has attempted to shield its patients from all disruptive influences, not particularly those arising from heated conversational exchanges concerning union activity. The rule was, in fact, originally formulated to shelter patient and visitor access areas of the Hospital from disconcerting debates concerning the Viet Nam War. That the rule was continued in effect and applied to ban activity which the Board has itself admitted can be upsetting to patients certainly cannot be said to indicate any anti-union bias on the part of Petitioner.

II. Even without Considering the Special Circumstances that Exist as a Result of a Hospital's Function in Providing Patient Care, No Rational Basis Exists for the Board's Disparate Treatment of a Hospital Cafeteria and a Non-Hospital Restaurant.

A. *Commercial Considerations Were Improperly Overlooked.*

The patient and public areas of the Hospital are all utilized as a part of the service that the Hospital provides for its customers-patients and their visitors. Like the selling or public areas of a retail store, the patient and public areas of the Hospital should not be converted into an arena for the organization of employees, *supra.*

This Court might inquire, with more freedom than the Court of Appeals chose to exercise, *see* 554 F. 2d at 480, n.2, as to the reasoning of the Board in deciding that a commercial food-retailing establishment is to be treated differently merely because it is located within a health care complex. It is an inescapable fact that, apart from all the crucial

considerations regarding health care, the Beth Israel Hospital cafeteria and coffee shop are commercial restaurant facilities. There is no rational basis for treating a restaurant employer differently because his commercial establishment is located within a hospital and serves hospital employees. The Board erred in affording disparate treatment to hospital cafeteria operators, and it was error for the First Circuit to defer to the Board's treatment of this issue. The Tenth Circuit in deciding *St. John's Hospital & School of Nursing v. NLRB,* 557 F. 2d 1368 (10th Cir. 1977), noted that the First Circuit in the instant case

> failed to consider the hospital's normal "commercial" interests in the operation of a public cafeteria and coffee shop and the fact restrictions on solicitation are universally allowed in analagous facilities in non-hospital settings.

Id. at 1375, n.7.

It is very significant that this factor was the basis for the decision of the District of Columbia Circuit in sustaining the hospital's no-solicitation rule as it was applied in the cafeteria and vending machine area in *Baylor University Medical Center* v. *NLRB, supra.* Relying on the commercial nature of this aspect of the hospital's operation as a self-sustaining basis for justifying enforcement of the rule, the court rejected the arguments posed by the Board and said:

> Respondents suggest that the precedents involving commercial establishments are inapposite here because — unlike such institutions — hospitals do not risk losing their "customers" due to the irritation of solicitation. While the principal business of retail establishments is attracting customers, a hospital's main concern — it

> is argued — is patient care, and its shops and cafeterias are no more than peripheral to its main operation. To the extent that this argument has any force whatsoever, it is wholly misplaced in this context. Whether or not patients and their visitors have choice about whether or not to use the hospital, they certainly have a choice about whether or not to use its cafeteria and vending machines. The cafeteria and vending area must still compete to attract the business of the hospital's patients. That a hospital is not "principally" in the restaurant business does not mean that it is not concerned that the restaurants which it does operate should be as attractive and profitable as possible. Public cafeterias in hospitals are operated as a convenience to its patients and their visitors and there is no justification for saddling them with restrictions, not applicable to cafeterias generally, that might from time to time compel them to operate at a loss. Assuming arguendo that a disturbance in the cafeteria would not significantly impede the hospital's health care, Baylor still has an independently valid interest in the profitable and orderly operation of its commercial food services which justifies barring solicitation in its restaurants.

Id. at p. 16-17 (footnote omitted).

The primary function of a medical care facility is, naturally, to provide care for its patients. However, the Hospital also has an interest in the proper functioning of its commercial facilities. It is improper for the Board to assess the validity of the rule solely in regard to the Hospital's primary function of providing immediate patient care. Thus, Petitioner contends that the commercial nature of its cafeteria and coffee shop constitutes an independent basis for sustaining its rule against solicitation in those areas.

B. *Even without an Expectation of Profit, Petitioner Has an Independently Valid Interest in Making Its Cafeteria as Pleasant as Possible to Enrich the Overall Quality of the Hospital Environment for Its Customers.*

The patient and public areas of the Hospital are all areas used as a part of the service that the Hospital provides for its customers, patients and their visitors. Irrespective of whether or not Petitioner's cafeteria operation generates a profit, it is still imperative that a tranquil atmosphere conducive to relaxation and recuperation be maintained in that area. As was pointed out in the *Baylor University Medical Center v. NLRB* decision, *supra*:

> It does not appear from the record, but it may be the case, that Baylor operates its cafeteria and vending machines as a non-profit service, so that in this respect it differs somewhat in its objectives from those of the usual restauranteur. Nevertheless, in providing its services, it has much the same interest, albeit non-financial, that any owner does in making his facilities as pleasant as possible. Whether the motive is monetary enrichment or enriching the overall quality of the hospital environment, employers who operate establishments whose raison d'etre is their pleasantness are justified in imposing otherwise overbroad no-solicitation rules. It is not the goal of making money, but of running a facility whose primary goal is to be attractive that supports the special treatment accorded to restaurants in this regard.

Id. at 17.

It should not go unnoticed that it is the Hospital which has a duty to provide the therapeutic milieu required to effectuate recovery of its patients. It is the Hospital, not the Union or the Board, which is held answerable, morally and legally, when something goes wrong with the curative and recovery process.

Another consideration for this Court is the fact that the Beth Israel rule is easily understood and adapted to fair and uniform application. In contrast, the Board's "immediate patient care area" formula as developed in the *St. John's* case is patently ambiguous (a problem noted by the Tenth Circuit in denying enforcement), and promises to be a source of constant litigation in the future as it is applied to the varied operations of each individual hospital. The Board has wavered in delineating which areas of a hospital are off-limits to solicitation and distribution by employees.

The vacillation by the Board on this issue has left health care institutions in a state of uncertainty as to which rules need to be revised and which rules may be enforced with an expectation that their enforcement will not subject them to penalty upon another sudden shift of Board policy in the future. This Court should, therefore, take this opportunity to provide guidelines to the Board and courts which will reestablish that the hospital setting presents a situation where there exist third party rights which must be recognized and accommodated.

Conclusion.

For the reasons set forth above, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

LOUIS CHANDLER,
99 High Street,
Boston, Massachusetts 02110.
(617) 542-6789

Of Counsel:
Robert Chandler,
Stoneham, Chandler & Miller.

Addendum.

Decision.

JD-846-77
Boston, Mass.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS
BOARD DIVISION OF JUDGES
WASHINGTON, D.C.

Cases 1—CA—11469, 1—CA—11479,
1—CA—11580, 1—CA—11581,
1—CA—11582, 1—CA—11661,
and 1—CA—12161

BETH ISRAEL HOSPITAL
and
MASSACHUSETTS HOSPITAL WORKERS UNION,
LOCAL 880, SERVICE EMPLOYEES INTER-
NATIONAL UNION, AFL—CIO

Kathleen F. McCarthy, Esq., and *Harold Kowal, Esq.*, for the General Counsel.

Robert Chandler, Esq., of the firm of *Stoneman, Chandler & Miller*, Boston, Mass., for Respondent.

DECISION

Statement of the Case

BENJAMIN K. BLACKBURN, Administrative Law Judge: On April 14, 1977, the Board issued its Decision

and Order in this proceeding.[1] On August 3, *sua sponte*, it remanded "to permit the parties to litigate the general applicability of Respondent's no-solicitation/no-distribution rule in areas of the hospital other than the cafeteria and coffee shop—*viz*, all areas to which patients, visitors, and employees have access, other than immediate patient care areas" because of the reservations expressed by the United States Court of Appeals for the First Circuit in *N.L.R.B.* v. *Beth Israel Hospital*, 554 F.2d 477, a prior proceeding involving the same parties and similar issues, "concerning Respondent's opportunity in this earlier case to litigate fully the validity of [the nosolicitation/no-distribution] rule as applied to areas of the hospital other than the cafeteria and coffee shop." The hearing was held on October 17, 1977, in Boston, Massachusetts. The General Counsel presented no evidence. Consequently, the following "findings of fact based upon the evidence received" at that time reflect the credited testimony of witnesses presented by Respondent:

Findings of Fact

Beth Israel Hospital is an eight-story complex of buildings, with a contiguous four-story parking garage which extends from the basement 5 through the third-story level of the hospital proper. The principal buildings are known as Feldberg and Rabb. (At the time of the events chronicled in the section of my original Decision entitled "Facts" the physical layout was somewhat different, for, I gather, Feldberg Building was still under construction at that time. The differences are 10 unimportant.) There are separate entrances to Feldberg and Rabb, the principal entrance being Feldberg. Both are off Brookline Avenue. There are also entrances on sides of the com-

[1] 228 NLRB No. 195.

plex other than Brookline Avenue. All the buildings are interconnected. Employees of the hospital are expected to park their cars on the two top levels of the parking garage. However, the rule is not strictly enforced. Patients and visitors frequently park their cars on the two top levels as well as the two bottom.

Beth Israel treats both in-patients and out-patients. Out-patients, generally, move about the hospital on their own between 8 a.m. and 4 p.m. In-patients, generally, are transported and escorted as they go from one area to another for treatment. They move through corridors and on elevators from their rooms to operating rooms, laboratories, and similar patient care areas. In so doing, they traverse almost, but not quite, all of the corridors and ride in all of the elevators in the hospital.

Patients are in areas near the Feldberg and Rabb entrances while waiting to be admitted to the hospital, while waiting for pharmacy service, and while waiting for clinical treatment as out-patients. The areas of the hospital which are off limits to them are some administrative offices, the dietary department, the kitchen, the laundry, the staff locker rooms and lounges, and the general stores areas. Occasionally, patients who have lost their way even blunder into them.

Patients who are waiting to undergo surgery or who are on the mend walk to and utilize the services of the gift shop. They also, on occasion, walk to the cafeteria. (There is no longer a separate coffeeshop in the hospital.) Their purpose is, generally, not to utilize the services of the cafeteria as a place to get something to eat but as a place where they can see children who are forbidden by hospital rules to visit them in their rooms.

Patients walk in corridors on the floors where their rooms are located as part of their therapy, frequently

soon after surgery. They also sit in corridors near their rooms on occasion. Solaria on floors where patient rooms are located are also utilized for walking and sitting therapy. This sort of activity does not, generally, occur before 7 a.m. or after 9 p.m. Other time factors are nonemergency admissions, 10 a.m. to 4 p.m., and visiting hours in nonemergency situations, early afternoon to 9 p.m. There are many exceptions to these as well as all other facts found to be "generally" true.

The fact that a patient is ambulatory, i.e., able to walk about on his own, furnishes no indicium as to the seriousness of his illness. Ambulatory patients may be quite sick. All patients who do not die are ambulatory at some stage of their stay in Beth Israel.

Adult human beings become childlike, vulnerable, and irrational when they are sick. From a patient's point of view, the ideal hospital environment is one of quiet professionalism, efficiently organized, which is directed to his needs. Solicitation and distribution in 15 patient access areas can interfere with patient care functions. Such activity can be disturbing to patients and their families, persons who are particularly susceptible to being disturbed. Such disturbance can interfere with Beth Israel's primary function of curing illness.

Conclusions of Law and Recommendations

In addition to "findings of fact based upon the evidence received," the Board's Order Remanding Proceeding to Regional Director for Hearing imposes on me the duty of including conclusions of law and recommendations in this Decision. In its brief Respondent urges conclusions and recommendations which would reverse the Board's original Decision and Order holding that the discharge of Gregory Spear on February 23, 1976, and the issuance

of warnings to employees on various occasions violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, because the no-solicitation/no-distribution rule was invalid. Its argument is based, in part, on the United States Court of Appeals for the Tenth Circuit's reversal of the Board in *St. John's Hospital and School of Nursing, Inc.* v. *N.L.R.B.*, 557 F.2d 1368.[2] (The Board's decision in *St. John's* is found at 222 NLRB 1150 (1976).) In this proceeding, the Board relied on its *St. John's* decision to rule that Respondent's no-solicitation/no-distribution rule is an overly broad restriction on employee rights. The Tenth Circuit notwithstanding, the Board's original decision in this proceeding and *N.L.R.B.* v. *Beth Israel Hospital, supra,* make the illegality of Respondent's rule the law of the case. I am bound by that law. Therefore, I reiterate the conclusions of law contained in my original Decision and recommend that the Board reaffirm the Order it issued in this proceeding on April 14, 1977.[3]

Dated, Washington, D.C. December 14, 1977

Benjamin K. Blackburn
Administrative Law Judge

[2] I note, however, that the United States Court of Appeals for the Seventh Circuit has since followed the First and is, thus, also in disagreement with the Tenth. *Lutheran Hospital of Milwaukee, Inc.*, 96 LRRM 2515 (1977).

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Respondent's Motion to Correct Typographical Errors in Administrative Law Judge's Decision.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 1-CA-11469, 1-CA-11479, 1-CA-11580, 1-CA-11581, 1-CA-11582, 1-CA-11661, 1-CA-12161

BETH ISRAEL HOSPITAL
and
MASSACHUSETTS HOSPITAL WORKERS UNION, LOCAL 880, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

RESPONDENT'S MOTION TO CORRECT TYPOGRAPHICAL ERRORS IN ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.47 of the Rules and Regulations of the Board Series 8, as amended, Respondent hereby moves that the above entitled matter be transferred to Administrative Law Judge Blackburn for the limited purpose of correcting the following typographical errors:

Number "5" was improperly inserted at p. 2, L 4.

Number "10" was improperly inserted at p. 2, L 9.

Number "15" was improperly inserted at p. 3, L 14.

Apparently the insertion of the above numbers somehow relates to the printing scheme.

Respondent moves that the Administrative Law Judge correct the decision by deleting the numbers in order to avoid any misleading effects.

Respectfully submitted,
STONEMAN, CHANDLER & MILLER
By /s/ Robert Chandler
Robert Chandler
Attorneys for
BETH ISRAEL HOSPITAL

P. O. Address:
99 High Street
Boston, Massachusetts 02110
January 3, 1977